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No. 82-1312

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY

AND

THE MONTANA POWER COMPANY, *et al.*,

Petitioners,

versus

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF AMICUS CURIAE
UTAH PUBLIC SERVICE COMMISSION**

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IN SUPPORT OF PETITIONERS

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MOTION OF THE
UTAH PUBLIC SERVICE COMMISSION
FOR LEAVE TO FILE BRIEF AMICUS CURIAE
IN SUPPORT OF PETITIONERS

The Utah Public Service Commission respectfully requests leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari, filed in this case by Utah Power & Light Company ("Utah Power") and the Montana Power Company. The Public Service Commission has requested from each of the nine parties to the case consent to file this *amicus curiae* brief. As of the time this motion was printed, written consent had been received from the following parties: Solicitor General, Department

of Justice; Federal Energy Regulatory Commission; Utah Power & Light Company and The Montana Power Company; Pacific Power & Light Company; Pacific Gas & Electric Company and Wisconsin Power and Light Company; and Alabama Power Company and the Hydroelectric Utility group. No party had provided written notice of a refusal to consent. Neither a consent nor a denial had been received from the following parties: American Public Power Association; City of Bountiful, Utah; Clark-Cowlitz Joint Operating Agency; and City of Santa Clara, California. Copies of the relevant correspondence have been filed with the Clerk of this Court.

The Utah Public Service Commission's interest in this case stems from its role as a public regulator of utility use of Utah's natural resources and also as the agency charged with assessing the economic impact of utility charges on Utah consumers and on the well-being of the State of Utah. The availability of inexpensive hydroelectric power to the broadest group of Utah electric power consumers is an issue of particular importance to the Utah Commission in its efforts to regulate and maintain the supply of electric power at the lowest possible cost.

On June 27, 1980, the Federal Energy Regulatory Commission ("FERC") issued an "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings," 11 F.E.R.C. (CCH) ¶61,337 ("Opinion 88"), threatening to eliminate the Utah ratepayers' access to inexpensive hydroelectric power. As a result, a limited number of fortunately situated municipalities will be allowed to "acquire" the hydroelectric facilities at a cost far below fair market value. The inexpensive power produced from these "acquired" facilities will then be available only to the acquiring municipality while all other Utah ratepayers will experience rate increases.

The following *amicus curiae* brief discusses specifically the adverse impacts upon the public in Utah resulting from the FERC's ruling, as affirmed by the United States Court of Appeals for the Eleventh Circuit, in *Alabama Power Co. v. F.E.R.C.*, 685 F.2d 1311 (11th Cir. 1982). The fragmentation of the Utah hydroelectric facilities among separate municipalities would reduce the overall reliability of utility service in Utah. The threatened "acquisition" of the hydroelectric facilities at a cost far below fair market value would deprive the mass of Utah ratepayers of low-cost power from projects largely paid for by those ratepayers. The significance of these impacts is not specifically addressed in Utah Power's petition for a writ of certiorari, and the Utah Public Service Commission is uniquely well situated to provide such information. No other party is able to adequately represent the interest of the people of the State of Utah in this case.

The Utah Public Service Commission believes that the action of the Court below in affirming Opinion 88 will adversely affect the general welfare of the people of Utah and of the nation for the benefit of a limited number of fortuitous municipalities. The Utah Commission considers the decisions below to be extremely significant in that they would discourage full maximization of the nation's hydroelectric resources, dampen private investor interest in constructing, owning, or operating hydroelectric facilities, and have the net effect of raising consumers' electricity costs. The significance of the question of Federal law presented here is of primary relevance to the court's consideration of the petition for a writ of certiorari, and the full importance of that question can be appreciated only if the Court is completely aware of the impact on the ratepayers resulting from the decisions below.

The Utah Commission, due to its unique regulatory and public interest perspective, believes that it can provide this Court with valuable insight into the consequences of this case, and a more complete understanding of what is at stake in this litigation.

Respectfully submitted,

THE UTAH PUBLIC SERVICE COMMISSION

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March 3, 1983

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
INTEREST OF THE PUBLIC SERVICE	
COMMISSION OF UTAH	2
SUMMARY OF ARGUMENT	4
ARGUMENT: REASONS FOR GRANTING THE WRIT	4
I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE SUPREME COURT	4
A. Utah Power's Loss of the 13 Projects Will Re- duce the Reliability of Utah Power's System..	5
B. Opinion 88 Threatens to Deprive Utah Power's Ratepayers of Low Cost Power From Projects Largely Paid For by Those Rate- payers	6
II. THE COURT OF APPEALS FAILED TO THOROUGHLY EXAMINE THE FEDERAL ENERGY REGULATORY COMMISSION'S CONCLUSION	9
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

	Page
<i>Alabama Power Co. v. FERC</i> , 685 F.2d 1311, <i>reh'g denied</i> , 693 F.2d 135 (11th Cir. 1982)	2
<i>McMullin v. Public Service Comm.</i> , 7 Utah 2d 157, 320 P.2d 1107 (1958)	2
<i>Utah Cable Television Operators Assn. v. Public Service Comm.</i> , Utah, 656 P.2d 398 (1982)	2

STATUTES

FEDERAL POWER ACT, 41 Stat. 1063, 16 U.S.C. § 791a, <i>et seq.</i>	
§ 7(a), 16 U.S.C. § 800 (a) (1976)	9
§ 14, 16 U.S.C. § 807 (1976)	6, 9
§ 15, 16 U.S.C. § 808 (1976)	6
Utah Code Ann. § 54-3-1 (1953, as amended)	2

ADMINISTRATIVE MATERIALS

Federal Energy Regulatory Commission, Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings, 11 F.E.R.C. (CCH) ¶ 61,337, 20 Fed. Power Serv. (MB) 5-921 (1980); <i>aff. sub. nom.</i> , <i>Alabama Power Co. v. FERC</i> , 685 F.2d 1311, <i>reh'g denied</i> , 693 F.2d 135 (11th Cir. 1982)	2, 7
<i>Power Pooling In The United States</i> , FERC-0049, Office of Electric Power Regulation, Federal Energy Regulatory Commission Report, December, 1981	6
"Projected Costs of Electricity from Nuclear and Coal Fired Power Plants," Energy Information Administration, U.S. Dept. of Energy, DOE/EIA-0356/1 (1982)	7

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**BRIEF OF AMICUS CURIAE
UTAH PUBLIC SERVICE COMMISSION
IN SUPPORT OF PETITIONERS**

STATEMENT OF THE CASE

This controversy involves the interpretation of the scope of the statutory preference granted to municipalities under Part I of the Federal Power Act in licensing hydroelectric power projects. The petition for certiorari filed by Utah Power & Light Company ("Utah Power") and The Montana Power Company on February 4, 1983, contends that the Federal Power Act distinguishes between "original licensees" and "new licensees" and that the municipal pref-

erence does not apply in a relicensing proceeding against the "original licensee" applying for a license renewal. The Federal Energy Regulatory Commission ("FERC") interprets the term "new licensees" as used in § 7 (a) of the Federal Power Act to include any applicant for a new license, including the "original licensee," and therefore intends to apply the municipal preference against both "new" and "original" licensees. Federal Energy Regulatory Commission Opinion 88, "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings," issued June 27, 1980, 11 F.E.R.C. (CCH) ¶61,337 ("Opinion 88"). Opinion 88 was affirmed by the United States Circuit Court of Appeals for the Eleventh Circuit on September 17, 1982, as reported at 685 F.2d 1311 (11th Cir. 1982). The Utah Public Service Commission ("Utah Commission") files this brief as *amicus curiae* in support of petitioners Utah Power and The Montana Power Company, with the consent of the petitioners.

INTEREST OF THE PUBLIC SERVICE COMMISSION OF UTAH

The Utah Commission is the administrative body in the State of Utah with the duty to supervise the use of natural resources by utilities to avoid waste and to assure adequate and continuous service to the public. *McMullin v. Public Service Comm.*, 7 Utah 2d 157, 320 P.2d 1107 (1958). An important aspect of the Utah Commission's duty is the regulation of utility use of the State's limited water resources. The Utah Commission is authorized under Section 54-3-1 of the Utah Code to examine the "economic impact of [utility] charges on each category of customer, and on the well-being of the State of Utah." *See, Utah Cable Television Operators Assn. v. Public Service Commission*, Utah, 656 P.2d 398 (1982). Because Opinion 88 will have substantial adverse economic impacts on customers of non-municipal

utilities within Utah and on the State itself, the Utah Commission urges the Court to grant Utah Power's petition for a writ of certiorari in this case.

Utah consumers of electric power are served by Utah Power, by cooperatively-owned utilities, and by municipal utilities. Electric power needs in Utah are met through a combination of coal-fired, gas-fired and oil-fired thermal plants, geothermal projects, hydroelectric projects and (primarily in the case of municipal and cooperatively owned systems) by purchased power from federally-owned hydroelectric projects. The least expensive sources of electric energy for consumers in Utah are the hydroelectric projects, and among the least expensive sources of hydroelectric power are Utah Power's older projects which are presently subject to relicensing proceedings or which are scheduled to be relicensed by the FERC within the next twenty years. The 13 hydroelectric projects of Utah Power with licenses that expire within the next 20 years are:

<u>Name</u>	<u>Capacity (kw)</u>	<u>License Expires</u>
Weber	2,500	Already Expired
Olmsted	12,700	Already Expired
Beaver	2,400	Already Expired
Ashton	5,800	December 31, 1987
St. Anthony	500	December 31, 1987
Cutler	30,000	December 31, 1993
Stairs	1,000	June 30, 2000
Oneida	30,000	June 30, 2000
Pioneer	5,000	August 31, 2000
American Fork	950	October 31, 2000
Cove	7,500	October 1, 2001
Grace	33,000	October 1, 2001
Soda	14,000	July 4, 2003
<hr/> Total Capacity	<hr/> 145,350	

The Utah Commission regulates Utah Power's retail sales of electricity in Utah generated by these 145,350 kilowatts of inexpensive hydroelectric power capacity with a policy goal of assuring maximum benefit for all Utah ratepayers. Utah Power consumers' rates reflect the low cost power produced by these facilities. These projects were largely paid for by Utah ratepayers through inclusion in their rates of depreciation charges and return on Utah Power's original investment in these projects. The ratepayers of Utah Power have a substantial interest in seeing Utah Power maintain the inexpensive components of its power producing system. The Utah Commission takes the position that Utah Power's ratepayers should continue to receive the benefits of these 13 projects which they have largely paid for over the last 60 years. The Utah Commission's mandate to protect the public interest of all the customers of the electric utilities it regulates compels it to express its support for the petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Utah Commission urges the Court to review the decision below because of the legal and practical consequences of that decision. The Utah Commission believes that the practical effects of the decision upon electric energy consumers, particularly in Utah, should be noted by the Court. This *amicus curiae* brief addresses the economic impacts and the unfairness of allowing a few unregulated municipalities to take over the hydroelectric facilities of a State regulated utility to the detriment of a broader based group of electric consumers.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. This Case Presents an Important Question of Federal Law Which Should be Settled by the Supreme Court

The Utah Commission believes that the Supreme Court should grant petitioners' writ because of the practical im-

portance of the federal law questions raised in the writ. In particular, the Utah Commission emphasizes that the appellate court's affirmance of Opinion 88 has important practical consequences for consumers of electricity in almost every state. The impacts on Utah consumers are representative of the widespread effects of the Opinion. Investor-owned utilities licensed under Part I of the Federal Power Act serve approximately 43 million consumers.

A. Utah Power's Loss of the 13 Projects Will Reduce the Reliability of Utah Power's System

Utah Power operates an integrated system of power production, transmission and distribution. The integrated nature of a utility's operations provides important service benefits including system reliability and efficiency maximization. Utah Power's hydroelectric projects serve a unique and critical function within this integrated system by enhancing the reliability of Utah Power's overall system.

Utilities achieve reliability through use of individual components and subsystems which have been developed and tested to achieve low failure rates, and by providing multiple sources and paths for power supply so that no single equipment failure will cause service interruptions. Utah Power's hydroelectric projects serve these reliability functions in two respects: First, those projects which have storage capacity can provide peaking power to meet any unanticipated demands on Utah Power's systems. Second, Utah Power's hydroelectric facilities can provide an important "start up" capability for the entire Utah Power system following a system-wide service interruption.¹ Should Utah

¹ Utah Power has submitted contingency plans which provide for using its hydroelectric power to restore current following a black-out. As the Utah Division of Public Utilities has recognized, this option will be unavailable to Utah Power if the projects are

Power lose its hydroelectric facilities through relicensing proceedings, Utah Power will be required to provide greater reliability by augmenting its system "start up" with diesel or gas turbine units at great expense to the Utah ratepayers and with a significant increase in consumption of oil or natural gas.

The electric utility business is a business sensitive to economies of scale. Fragmentation of an integrated system leads to inefficiencies, duplication and waste when viewed on a regional scale.² Utah Power has experience and expertise in maintaining and operating its facilities, and a pool of personnel specifically trained to operate each particular hydroelectric project. Fragmentation will displace much of this expertise, adding to the inefficiency, waste and reliability losses of the entire regional system. It is the Utah Commission's goal to eliminate inefficiency and waste in the interests of the Utah ratepayer.

B. Opinion 88 Threatens to Deprive Utah Power's Ratepayers of Low Cost Power From Projects Largely Paid For by Those Ratepayers

In the event that Utah Power's projects are transferred to "new licensees," compensation to Utah Power from the "new licensee" is limited to "net investment" plus severance damages. *See*, §§ 14 and 15 of the Federal Power Act, as amended, 16 U.S.C. §§ 807-08 (1976). The "net in-

relicensed to other utilities. *Special Engineering Report: An Engineering Analysis of the UP&I. CO Power Outage of January 8, 1981*, Utah Division of Public Utilities, P. 5, February 6, 1981.

² *See Power Pooling In The United States*, FERC-0049, Office of Electric Power Regulation, Federal Energy Regulatory Commission Report, December, 1981, p. 2-5, 19. Although interconnection agreements among smaller utilities may help reduce the inefficiency of a fragmented system, these agreements have failed to recreate the service coordination and administrative efficiencies of a unified system. *See Id.* p. 39-50.

vestment" factor is based upon original cost less amortization over the years of operation. The remaining "net investment" at the time of relicensing, therefore, ignores the value of the facility for purposes of replacement capacity or the increased cost of fuel to operate a replacement facility. Thus, the FERC anticipates that the compensation the "original licensee" would receive

could range from zero to a substantial part of the cost of construction or acquisition many years ago when price levels were much lower than today, and would be considerably less than the cost of building or otherwise acquiring new generating capacity today.

Opinion 88 at p. 4. The Utah Commission believes that Utah consumers would thus face these adverse economic impacts: (1) compensation for the loss of property at less than its fair value, (2) increased system-wide electric rates due to loss of inexpensive power, (3) the expense of constructing replacement capacity at inflated capital cost and (4) increased fuel costs.³

³ These four conclusions are verified by recently filed documents of Utah Power and FERC publications. "The Annual Report of Electric Utilities and Licensees and Others," FERC Form No. 1, indicates that the original capacity cost of Utah Power's hydroelectric power plants ranges from \$132.00 to \$505.60 per kilowatt of installed capacity. The median cost of hydroelectric plant capacity is approximately \$240 per kilowatt. The replacement cost of that capacity in Utah is approximately \$995 per kilowatt (See, Energy Information Administration, U.S. Dept. of Energy, DOE/EIA-0356/1, Vol. 1, Projected Costs of Electricity from Nuclear and Coal Fired Power Plants, Table 7, p. 30 (1982) — four times the cost of the capacity already in place. Additionally, the new capacity will incur heavy fuel costs for coal, gas or oil. To the extent that the Utah ratepayers lose access to inexpensive hydroelectric power and are required to construct additional fossil fuel plant capacity, the Utah ratepayers will experience an increasing financial burden solely for the benefit of select municipalities favored under the FERC's interpretation of the Federal Power Act.

Several Utah Power hydroelectric generating facilities are located outside of the State of Utah. (The Ashton, Cove, Grace, Oneida, Soda and St. Anthony Plants are located in Idaho.) These out-of-state facilities were substantially paid for by the Utah electricity customers (who constitute 89 percent of Utah Power's customers) through their monthly utility bills. At present, these low-cost hydroelectric facilities help lower the average cost of power to all customers of Utah Power. If these out-of-state facilities are transferred to municipalities in Idaho pursuant to relicensing proceedings, the benefits of this inexpensive hydroelectric power will be permanently removed from the State of Utah, despite the significant contribution made by Utah consumers to pay for the projects.⁴

⁴ The disproportionate burden presently shouldered by Utah consumers has been previously noted by the Utah Commission in its ratemaking decisions. The Utah Commission has publicly criticized the continued refusal of the Wyoming and Idaho Public Service Commissions to provide Utah Power an adequate return on investment for Utah Power's activities outside of Utah:

[W]e realize that we may be to some extent carrying the regulatory burden of other jurisdictions, but to do otherwise would likely result in higher capital costs for all customers of Utah. It seems as if other jurisdictions would require Utah Power to be in virtually desperate financial condition before they would grant a more appropriate rate relief. *Utah Power & Light Co.*, Case No. 79-035-103 (January 28, 1980).

The FERC's decision affirmed by the Eleventh Circuit Court of Appeals would add to the already disproportionate burden on the Utah electric ratepayers.

II. The Court of Appeals Failed to Thoroughly Examine the FERC's Conclusion

Nothing in the language of the Federal Power Act provides that original licensees are to be subject to a municipal preference in relicensing proceedings. Instead, Section 7 (a) of the statute limits application of the municipal preference by use of the phrase "to new licensees;" and "new licensees" are all applicants *other than* an original licensee. There is no compelling legislative history or policy reason to read the statute as if it established a preference against original licensees. The opportunity for the governmental takeover of licensed projects is fully preserved without such preference by (1) opportunity for condemnation, expressly reserved by Section 14 (a) of the Act, 16 U.S.C. § 807 (1976), (2) Federal takeover pursuant to Section 14, (3) a preference against "new licensees" in relicensing and (4) the opportunity to compete on an equal footing with original licensees in relicensing, under Section 7(a)'s "best adapted" standard. 16 U.S.C. § 800 (a) (1976).

The Court of Appeals failed to examine carefully the FERC's analysis in Opinion 88; it affirmed the result without seriously analyzing the reasoning and the materials relied upon by the FERC. The FERC's position is inconsistent with the language and legislative history of the Federal Power Act, as well as with the statutory policy of serving, first and foremost, the public interest in the use of limited and valuable hydroelectric power resources.

CONCLUSION

The Court should review this case because of the substantial interest of electric consumers in Utah and throughout the nation in the future allocation of benefits of low-cost hydroelectric power. The decision below provides important advantages to municipal applicants competing with Utah Power and other investor-owned utilities for new

licenses upon expiration of original licenses. In Utah Power's case, those competitive advantages may ultimately result in the transfer of Utah Power's projects to municipal "new licensees." In view of the substantial disruption to Utah Power's system and the manifest injustice which such a transfer would produce, this Court should grant certiorari in order to determine whether Congress intended to establish a municipal preference against "original licensees."

Respectfully submitted,

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